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Nos. 765, 766 and 774

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 765

CHARLES J. GREGORY, *et al.*,

Petitioners,

vs.

THE COLUMBIA GAS SYSTEM, INC., *et al.*,

Respondents.

No. 766

PAUL E. KERN,

Petitioner,

vs.

THE COLUMBIA GAS SYSTEM, INC., *et al.*,

Respondents.

No. 774

ELMO E. ALLEN, *et al.*,

Petitioners,

vs.

THE COLUMBIA GAS SYSTEM, INC., *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI

MOTION OF RESPONDENT THE COLUMBIA GAS SYSTEM, INC. FOR LEAVE TO FILE MEMORANDUM IN REPLY TO MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION

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April 16, 1959

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Columbia Gas System, Inc., Respondent (Columbia), respectfully moves the Court for leave to file the attached Memorandum in Reply to the Memorandum for the Securities and Exchange Commission.

The petitions herein were filed by March 14, 1959, and all the briefs in opposition (including Columbia's) were filed by March 21. The Securities and Exchange Commission filed its Memorandum on April 14. That Memorandum supports each of the petitions and Columbia has not had an opportunity to reply.

Respectfully submitted.

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MEMORANDUM OF RESPONDENT THE COLUMBIA GAS SYSTEM, INC. IN REPLY TO MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION

I.

As to the applicability of the rule against post-bankruptcy interest to the senior class of two classes of unsecured creditors, the Memorandum for the Securities and

Exchange Commission (SEC Memorandum) states and restates (italics ours):

> ". . . there is little, if any, evidence that the common-law interest rule was *ever* so applied to creditors of different rank. (p. 10)
>
> ". . .
>
> ". . . We believe . . . that there is *no established body of precedent* disallowing post-petition interest as between classes of different priorities. (pp. 11-12)
>
> ". . .
>
> ". . . While it is true that there is no established 'exception' specifically allowing interest to the senior of two classes of unsecured creditors having different contractual priorities (*e.g.*, senior and junior debentures), it is equally true that there is *no established body of law* denying interest in that context." (p. 13)

This plainly is not so. In our Consolidated Brief in opposition to the 1957 series of petitions for certiorari (Nos. 325, 336 and 342, October Term 1957), we cited a number of decisions (not involving tax claims) expressly denying post-bankruptcy interest to the senior of two classes of unsecured creditors. We assembled these under a heading directly addressed to this point—

> "2. The 'fundamental principle' [against allowance of post-bankruptcy interest] is not altered by the fact that there are differences in rank between unsecured claims *inter sese*." (1957 Consolidated Brief, p. 16)

and we classified the cases according to the source of the priority enjoyed by the unsecured claims denied post-bank-

ruptcy interest, *viz.*; "Contractual Priority",* "Equitable Priority"** and "Statutory Priority".***

The entitlement of senior unsecured creditors to post-bankruptcy interest was a question briefed and argued at length to the Court of Appeals in 1957. Judge Miller's opinion for the court treated the arguments of the then appellants and SEC as "in effect" urging a fourth exception to the general rule, namely, that

> ". . . post-bankruptcy interest should be paid to an unsecured claim of a higher rank before any payment is made to a claim of a lower rank".

The many authorities referred to by Judge Miller in his opinion for the court† rejecting this proposition demon-

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*Decisions cited under this heading were:

Jamison v. *Federal Deposit Insurance Corporation*, 149 F. 2d 199 (5th Cir. 1945); *United States* v. *Paddock*, 187 F. 2d 271 (5th Cir. 1951); *FDIC* v. *Dep't of Financial Inst.*, 113 Ind. App. 14, 44 N. E. 2d 992 (1942); *Atlanta Nat'l Bank* v. *Four States Grocer Co.*, 135 S. W. 1135 (Tex. Civ. App. 1911); *Att'y General* v. *Supreme Council A. L. H.*, 206 Mass. 131, 92 N. E. 134 (1910).

**Decisions cited under this heading were:

Thomas v. *Western Car Co.*, 149 U. S. 95 (1893); *New York Trust Co.* v. *Detroit, T. & I. Ry.*, 251 Fed. 514 (6th Cir. 1918); *Application of Progress Shoe Co.*, 107 F. Supp. 114 (E. D. N. Y. 1952); *Farish* v. *Holley*, 244 Ala. 19, 12 So. 2d 88 (1943); *Squire* v. *American Express Co.*, 131 Ohio State 239, 2 N. E. 2d 766 (1936); *McGinnis* v. *Corporation Funding & Finance Co.*, 8 F. 2d 532 (M. D. Pa. 1925)

***Decisions cited under this heading were:

Missouri v. *Earhart*, 111 F. 2d 992 (8th Cir. 1940); *In re Pacific Coast Building-Loan Ass'n*, 15 Cal. 2d 134, 99 P. 2d 251 (1940); *Fulton* v. *B. R. Baker-Toledo Co.*, 128 Ohio State 226, 190 N. E. 459 (1934); *Taylor* v. *Corning B. and T. Co.*, 185 Ark. 691, 48 S. W. 2d 1102 (1932) *Leach* v. *Sanborn State Bank*, 210 Iowa 613, 231 N. W. 497 (1930); *Cosmopolitan Trust Co.* v. *Suffolk Knitting Mills*, 247 Mass. 530, 143 N. E. 138 (1924); *United States F. and G. Co.* v. *Carnegie Trust Co.*, 161 App. Div. 429, 146 N. Y. Supp. 804 (1st Dep't), *aff'd* 213 N. Y. 629, 107 N. E. 1087 (1914); *People* v. *American Loan and Trust Co.*, 172 N. Y. 371, 65 N. E. 200 (1902).

†*In re Inland Gas Corporation*, 241 F. 2d 374, 382 (6th Cir. 1957); Gregory-Vanston Petition App., p. 24a.

strate both that there is an "established body of precedent" on the question and that it is established squarely against the argument made by the SEC Memorandum.

II.

The SEC Memorandum (Point II, pp. 24-28) supports the Allen Petition (No. 781), which urges rejection of Columbia's claims in favor of the American stockholders. SEC gives no inkling of the frequency with which that issue has been urged on the courts below and the frequency with which, with full knowledge of their equitable power to reject, the courts have resolved it adversely to the American stockholders.* The Court of Appeals in its 1957 decision herein stated that

> "... Under the ruling in *Sampsell* v. *Imperial Paper and Color Corp.*, 313 U. S. 215 and *Pepper* v. *Litton*, 308 U. S. 295, the Court had authority to disallow the claim of Columbia..."

and, with respect to the arguments that such authority be exercised, said

> "... We have rejected these contentions in prior appeals. The Court in the present case is unanimous in its view that those rulings be adhered to..."**

Columbia Gas & Elec. Corp. v. *United States*, 151 F. 2d 461, 470 (6th Cir. 1945), *cert. denied*, 329 U. S. 737 (1946); *In re Inland Gas Corp.*, 187 F. 2d 813, 819-820 (6th Cir. 1951); *In re Inland Gas Corp.*, 211 F. 2d 381, 382-384 (6th Cir.), *cert. denied*, 348 U. S. 840 (1954); *In re Inland Gas Corp.*, 217 F. 2d 207, 208 (6th Cir. 1954); *In re Inland Gas Corp.*, 241 F. 2d 374, 381-382 (6th Cir.), *cert. denied*, 355 U. S. 838 (1957).

**In re Inland Gas Corporation*, 241 F. 2d 374, 382, Gregory-Vanston App., p. 24a.

III.

Point II of the SEC Memorandum also urges that the Allen Petition be granted to bring up for review questions relating to the public holders of Inland stock (for whom, Inland being insolvent, the Plan of Reorganization does not provide any participation). The principal question suggested is whether the District Court had power to subordinate Columbia's creditor claims to those Inland stockholders.

First. The Allen Petition on behalf of the stockholders of *American* could not properly present questions of the rights of the stockholders of *Inland*. In fact, neither the Allen Petition nor any of the Kentucky Petitions purports to present any such question. Questions of the rights of the public holders of the 1.4% Inland stock are questions raised and urged here by SEC only.*

Second. The power of the District Court to subordinate Columbia's creditor claims against Inland to the publicly-held Inland stock has not been denied by the District Court or by the Court of Appeals, and is not in question in these proceedings.** The 1961 opinion of the Court of Appeals, which recognized the power to subordinate creditor claims to stock in its formulation of the "quasi-creditor" doctrine, considered on the merits and upheld the entitlement of

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*It is to be noted that Section 208 of the Bankruptcy Act, in defining the role of the Securities and Exchange Commission in Chapter X proceedings, provides that ". . . the Commission may not appeal or file any petition for appeal in any such proceeding."

**The abstract and academic character of this question is emphasized by the fact, referred to by SEC, that the public holders of Inland stock "are unrepresented in these proceedings." (SEC Memorandum, p. 27) In so pointing out that no Inland public stockholder has appeared in these proceedings since the start of them in December, 1930, SEC itself suggests a good reason why—even if a question of Inland stockholder rights were presented by the record—review of it would not be appropriate.

Columbia's creditor claims vis-a-vis the publicly held Inland stock.* The basis for the refusal to subordinate Columbia's claims to the public stockholders of Inland is thus, not a misconception of powers, but a conception of the facts and of the equitable relief which they make appropriate.

Respectfully submitted,

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In re Inland Gas Corporation, 187 F. 2d 813, 816-817 (6th Cir. 1951).